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Full Story (pdf) >

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# Warning: Patent Trolling

Robert (Bob) Cotter

One of our clients was recently involved in a patent lawsuit. Apparently, some individuals had purchased a patent which they contend gave them all rights relating to the rotation of images on mobile devices (i.e., iPhone, iPad, android, etc.). The owners of the patent filed dozens of lawsuits around the country against companies using this technology alleging infringement.

Unfortunately, these cases can be expensive to defend even if it is ultimately determined that there is no validity to the patent or there is no patent infringement. Knowing this, the patent owners readily offer to "settle" these claims by providing the defendants with a "license" to use their patent in exchange for a monetary payment for both the license and the past alleged violation. As part of the settlement, the parties enter into a non-disclosure agreement whereby the terms of the settlement are confidential and cannot be disclosed to third parties.

According to the White House Council of Economic Advisors, abusive patent lawsuits are a growing drain on companies and the court system. More than 100,000 companies were sued or threatened with infringement lawsuits last year by patent owning companies. Because of the recent proliferation of these patent lawsuits, President Barack Obama recently announced a series of actions aimed at protecting technology, finance and retail companies from these lawsuits and demands for fees by businesses that abuse the patent system. These actions include improving patent application examinations, identifying who benefits financially from the patent, and providing penalties for abusive lawsuits.

If you are sued as a defendant in a patent infringement lawsuit, it is important to immediately seek defense and indemnity from the party from whom you obtained the allegedly infringing patent. It is also important to retain counsel immediately to analyze the potential risk and determine the best way to effectively defend the lawsuit.

For more information about this article, contact:
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John Wilcox

# Transportation Broker Prevails Against Claim of Negligent Entrustment

It is generally accepted that the case of Schramm v. Foster, 341 F.Supp.2d 536 (D. Maryland (2004), opened the door for personal injury/wrongful death plaintiffs to bring claims against transportation brokers after an accident with a motor carrier. In Schramm, the parents of a minor motorist who was involved in a collision brought personal injury actions against the motor carrier, the truck driver and C.H. Robinson, the company that brokered the shipment being transported by the truck driver. Plaintiffs alleged that C.H. Robinson was liable under a number of theories, including negligent hiring in its selection of the motor carrier. C.H. Robinson filed a motion for summary judgment, which was denied by the court on plaintiffs' negligent hiring claim. In its ruling, the Schramm court found C.H. Robinson's self–proclaimed status as a "third-party logistics company" providing "one point of contact" service to its shipper clients was sufficient under Maryland law to require it to use reasonable care in "selecting the truckers whom it maintains in its stable of carriers."

The Schramm decision was particularly troubling for the industry in that it created the potential for brokers to be found liable for personal injuries and death that they may have had very little to do with. In addition to the liability concerns, the court held that a broker's duty to use reasonable care in the selection of motor carries, included, at least, the duties (1) to check the safety statistics and evaluations of the carriers on the SafeStat database maintained by the Federal Motor Carrier Safety Administration, and (2) to maintain internal records of the persons with whom it contracts to assure that they are not manipulating their business practices in order to avoid unsatisfactory SafeStat ratings. The court's claim that these obligations are not onerous showed a fundamental lack of understanding as to how the third party intermediary industry operates.

Schramm proved not to be in aberration. In Jones v. C.H. Robinson Worldwide, Inc., 558 F.Supp.2d. 630 (W.D. Va. 2008), a southbound tractor trailer driver, who was injured in an accident with a northbound tractor trailer, brought a personal injury action against a number of parties including C.H. Robinson, the motor carrier broker. Again, C.H.

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Robinson filed a motion for summary judgment on Plaintiff's claim of negligent hiring. Again, the District Court denied the motion stating that there was a genuine issue of material fact regarding whether C.H. Robinson breached the appropriate duty of inquiry in selecting a competent motor carrier. It was further stated that C.H. Robinson had the duty to investigate the fitness of the northbound tractor trailer owner prior to hiring it to carry a load on public highways.

In Sperl v. C.H. Robinson Worldwide, Inc., 943 N.E. 2d. 463 (Ill. App. 2011), the Illinois Court of Appeals upheld a jury verdict against C.H. Robinson for nearly $24 million. The Sperl decision was based largely on the jury's finding that C.H. Robinson had substantial control over the driver's work, which supported the finding of an agency relationship between it and the driver.

C.H. Robinson finally prevailed in the case of Hayward v. C.H. Robinson, in which an Illinois trial court granted summary judgment in December 2012. The Hayward court found that the facts where distinguishable from Sperl, Jones and Schramm. Again, the primary issue was the extent of control asserted by C.H. Robinson. The court found that C.H. Robinson acted merely as a broker and not as a carrier in that: (1) it did not control the manner in which the driver performed his work; (2) it did not have the right to discharge the driver; (3) it did not pay the driver; (4) the driver and carrier provided the necessary equipment; (5) it did not deduct taxes from the drivers wages; and (6) the level and skill required by the driver was not significant.

For more information about this article, contact:
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# Recent Changes in Law Makes Now a Good Time to Review Your Estate Plan

The legislation passed in the early hours of 2013, the American Taxpayer Relief Act of 2012 (the Act), made substantial changes to a number of estate planning considerations. It has offered increased certainty in numerous estate planning areas, and for the first time in over a decade, these changes have no explicit expiration date.

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This allows greater certainty for clients and attorneys alike in achieving a clients' estate planning goals. Some highlights of the Act include:

Austin Dowling

- The Act permanently maintains the Estate Tax Exclusion. This amount is adjusted each year for inflation, with the 2013 exclusion set at $5.25 million.
- The Act unifies the Estate Tax Exclusion and the Gift Tax Exclusion, meaning an individual may make lifetime gifts up to $5.25 million without paying gift tax (although any gifts that use a portion of this exclusion count towards, and reduces the Estate Tax Exclusion available at death).
- The Act makes permanent the concept of "portability", which allows a surviving spouse to carry over any unused exclusion of his or her deceased spouse (effectively granting a $10.5 million exclusion to married couples).
- The Act sets the Estate Tax rate at 40%, applied to any amount over the exclusion.

In addition to basic estate planning considerations, the Act makes it important for all clients to keep good documentation of any and all lifetime gifts they make. A surviving spouse who plans to take advantage of the estate tax portability tool must be diligent about filing the requisite estate tax returns within nine months after his/her spouse's death. For any surviving spouse or divorcee who has remarried, a careful review of his or her estate plan becomes especially important since there are a variety of beneficiary and tax consequences to consider.

The Act will not necessarily affect every client. For some, an update may not be necessary after a review. For others, a review may warrant modifications, including changes to beneficiaries, guardians, powers of attorneys, or consolidation of trusts that may no longer be necessary (because of the new favorable estate tax laws).

Given that we encourage clients to review their estate plan every three to five years, now is a good time to do so, given the relative certainty and permanency that the new laws

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provide. In addition to the changes in law mentioned above, changes in clients' personal situations may also necessitate a review or change to their estate plan. Births, deaths, marriages and divorces can all have an impact and cause plans to be outdated, as can changes in personal finances and business. If it has been more than three years since you have reviewed your estate plan with an attorney, the Estate Planning Attorneys at Dysart Taylor would be happy to review your current plan. We can discuss your situation and goals, regardless of whether we originally created your current estate plan. Please call us at 816.931.2700 to schedule an appointment to review your estate plan.

For more information about this article, contact:
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Michael Judy

# Missouri Comparative Fault

Prior to the enactment of Section 537.067, Missouri was a pure joint and several liability jurisdiction. In pure joint and several jurisdictions, a plaintiff can recover all of his damages from any defendant regardless of the percentage of fault attributed to that specific defendant. As such, a plaintiff can recover his million dollar verdict from a defendant who is only 10% responsible for an accident, rather than trying to collect from a defendant who is 90% responsible for an accident, but is insolvent.

In 2006, the Missouri General Assembly attempted to address this situation by amending Section 537.067 of the Missouri Statutes. Under the current framework, if a jury determines that a defendant is 51% or more responsible for an accident, a plaintiff can look to that defendant to collect its entire judgment. The situation is different. However, if the jury determines that the defendant is less than 51% responsible for the accident. In such a situation, the defendant is only responsible for the portion of the judgment equaling the percentage of fault assigned by the trial of fact. So, for example, if a defendant is determined to have 20% liability for a $1 million judgment, the plaintiff can only recover $200,000 from that defendant.

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When the legislature amended Section 537.067, it failed to address the effects that Section 537.060 would have on the newly amended 537.067. Section 537.060 allows a defendant to settle its claim with the plaintiff without discharging the other defendant or releasing it from liability. Additionally, it prohibits the non-settling defendant from seeking indemnity from the settling defendant. Rather, the non-settling defendant can only seek a credit for the amount the settling defendant pays in settlement. Id.

As such, Missouri law now treats a defendant that is less than 51% at fault for a subject accident differently depending on whether a co-defendant settles or proceeds to trial. For example, assume that defendant 1 (D1) is 10% at fault and defendant 2 (D2) is 90% at fault for an accident. Further assume that D1 is a large corporation and D2 is an individual with a $100,000 insurance policy, but no significant assets. If both defendants proceed to trial, and plaintiff receives a $1 million judgment, D1 is responsible for $100,000, and D2 is responsible for the remaining $900,000. If, however, D2 settles for $100,000 prior to trial, then D1 is responsible for the remaining $900,000.

Therefore, defendants who bear a larger share of the liability for an accident have a huge incentive to settle their claims if there is another defendant with "deeper pockets". Similarly, a plaintiff has a strong incentive to settle with this defendant, particularly in the scenario outlined above, because this will maximize her recovery. With both parties proceeding to trial, the plaintiff will only recover $200,000. By settling with the more liable, but poorer defendant, the plaintiff will recover her full $1 million.

Due to the potential inequities that can be involved in cases such as the one outlined above, it is important to obtain legal representation quickly. Otherwise, you may find yourself on the hook for more than your fair share of a judgment.

For more information about this article, contact:

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# Awards & Honors

### Dysart Taylor Receives Associate Member of the Year Award from American Subcontractors Association

On behalf of the firm, Lee Brumitt accepted the award for Associate Member of the Year by the Greater Kansas City Chapter of the American Subcontractors Association (GKCASA). The annual GKCASA Awards Banquet recognizes contributions made to the Kansas City construction industry by general contractors, engineers, architects, and subcontractors.

### Judy Joining the Big Board for Lawyers' Association of Kansas City

Mike Judy's term as President of the Lawyers' Association of Kansas City– Young Lawyers' (LAKC-YLS) Section came to an end in May. He was on the YLS Board for five years and is now transitioning to the LAKC Board.

### Brumitt Selected to 2012 Missouri Pro Bono Wall of Fame

Lee Brumitt was selected as a member of the 2012 Missouri Pro Bono Wall of Fame. This distinct honor is reserved for lawyers who have achieved a high level of pro bono service within a single year. Lawyers must complete and report 40 or more hours of pro bono service for the year in order to be eligible for the honor.

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# Conferences & Events

**May 1-5, 2013**
John Wilcox, Ken Hoffman and Pat McMonigle all attended the Transportation Lawyer's Annual Conference in Napa, California.

**May 10, 2013**
John Wilcox spoke at the Joint Meeting of the Tort and Transportation Law Committees of The Missouri Bar in Jefferson City. The presentation was entitled, "Basics of Motor Vehicle/Trucking Cases."

**July 14-17, 2013**
Pat McMonigle attended the American Trucking Associations General Counsel's Conference in Couer d'Alene, Idaho.

**July 2013**
Amanda Pennington Ketchum chaired the summer meeting of the Missouri Bar Young Lawyers Council at Big Cedar Lodge.

**July 30, 2013**
Dysart Taylor will be a hole sponsor for the Kansas City Transportation Association's golf tournament. Mike Judy will be playing in the event.